CONSTRUCTION CONTRACTS AND ADJUDICATION

WEBINAR LED BY SIR RUPERT JACKSON AT THE ASTANA INTERNATIONAL FINANCIAL CENTRE COURT ON 11 JUNE 2020

1. INTRODUCTION

1.1 In this lecture I will look at the law governing construction contracts and, in particular, at the adjudication regimes which prevail under many such contracts, either by operation of law or because of the parties' agreement. I will then discuss the wider use of adjudication and its possible application to dispute resolution at the AIFC International Arbitration Centre.

1.2 Abbreviations. In this lecture I use the following abbreviations:
"England" means England and Wales.
"HGCRA" mean the UK statute, Housing Grants, Construction and Regeneration Act 1996.
"PNBA" means Professional Negligence Bar Association.
"TCC" means the Technology and Construction Court in England.

2. CONSTRUCTION CONTRACTS

2.1 Construction law is a sub-set of the law of contract. But there are many common features in construction dispute resolution across all continents. The nature of construction contracts and the exigencies of construction projects mean that a group of special rules and procedures have evolved concerning the resolution of construction disputes. See for example *Construction Law*[1] by Julian Bailey, which synthesises the construction law of England, Australia, Hong Kong and Singapore.

2.2 Because construction law is a specialist field, some jurisdictions have established specialist courts to deal with construction disputes. In England and Wales, that court is the TCC.

2.3 Building projects around the world generate high value disputes of great complexity. These disputes usually arise out of standard form contracts, which are used internationally. The FIDIC conditions are often adopted in both civil and common law jurisdictions. Parties frequently deploy the *Delay and Disruption Protocol* published by the Society of Construction Law (an influential organisation with branches in many countries) for resolving delay and disruption claims.

2.4 At the moment, these disputes generally go to arbitration. Arbitrators around the world are grappling with recurrent issues arising from the FIDIC conditions or the *Delay and Disruption Protocol.* Because arbitrations are confidential, arbitrators do so largely in ignorance of what their colleagues are deciding.

2.5 The new international commercial courts which are emerging in many jurisdictions offer an alternative – and attractive – forum for such cases. Sir Vivian Ramsey sits in the Singapore International Commercial Court and is available to hear such cases. Sir Vivian is a former head of the TCC. Likewise, the AIFC Court can offer construction expertise. I too am a former head of the TCC.

[1] London Publishing Partnership, 2020

2.6 It would be helpful to the construction industry if a body of case law on construction issues emerges from the international commercial courts. Of course, we have the national law reports from many jurisdictions – the Building Law Reports edited by Atkin Chambers in London are a good example. But reports of construction cases which (a) arise out of international projects and joint ventures and (b) are decided in the new international commercial courts would be a valuable addition.

2.7 Will a general *lex constructionis* emerge? CJ Menon of Singapore has speculated that a common *Lex Mercatoria* may emerge from the growing band of international commercial courts. That may well happen over time. Likewise, a general *lex constructionis* may emerge from the decisions of the new breed of international commercial courts.

3. ADJUDICATION

3.1 Latham Report. In the late twentieth century, there was rising concern about the cost of construction litigation and delays in the process. Many contractors and sub-contractors were in dire straits, because employers and main contractors were failing to pass money down the line. Instead they were raising dubious counterclaims, which would take years to resolve. In 1993 the UK Government set up a review of procurement and contractual arrangements in the construction industry. Sir Michael Latham headed that review. In July 1994 Sir Michael published a report entitled "Constructing the Team", better known as the Latham Report. This recommended the introduction of special rules to secure prompt payment of sums due under construction contracts. The Latham Report also recommended the introduction of a new dispute resolution mechanism, namely adjudication.

3.2 The UK legislation. The HGCRA implemented the Latham Report with effect from May 1998. The Act requires every construction contract to provide for a payment regime and an adjudication regime, which comply with the requirements stated in the Act.

3.3 The payment regime required by HGCRA. The payment regime bans 'pay when paid' clauses. It requires prompt payment of all sums due under a construction contract, unless the party liable serves a withholding notice, explaining why it is withholding part or all of the sum claimed.

3.4 What is adjudication? An adjudicator ("A") is appointed to investigate a construction dispute swiftly and relatively informally. A reaches a decision within a short time period, typically 28 days. That decision is temporarily binding. Both parties must comply with it. But A's decision is not sacrosanct. Either party may litigate or (if there is an arbitration clause) arbitrate the same dispute. At the conclusion of that more thorough process, the decision reached by the judge or arbitrator prevails and A's decision ceases to be effective.

3.5 The "Scheme". If the contract fails to provide for a compliant payment regime and adjudication regime, then the "Scheme" automatically applies. This is set out in The Scheme for Construction Contracts (England and Wales) Regulations 1998. Both the Act and the Regulations have undergone amendment pursuant to Sir Michael Latham's supplementary report dated 17 September 2004. The HGCRA was amended by the Local Democracy, Economic Development and Construction Act 2009. These amendments are, essentially, fine tuning.

3.6 Parties cannot contract out of adjudication. The adjudication regime is mandatory, in the sense that either party can insist upon adjudication. But it is not compulsory. If both parties wish to proceed straight to litigation or arbitration, without troubling an adjudicator, they are free to do so.

3.7 The Scheme provisions concerning adjudication. The Scheme provides that a party to a construction contract may refer any dispute arising under that contract to adjudication. In relation to adjudication, the core provisions of the Scheme read as follows:

"12. The adjudicator shall—

(a)act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and

(b)avoid incurring unnecessary expense.

13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may—

(a)request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),

(b)decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,

(c)meet and question any of the parties to the contract and their representatives,

(d)subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,

(e)subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,

(f)obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,

(g)give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and

(h)issue other directions relating to the conduct of the adjudication.

14. The parties shall comply with any request or direction of the adjudicator in relation to the adjudication.

15. If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or

written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may—

(a)continue the adjudication in the absence of that party or of the document or written statement requested,

(b)draw such inferences from that failure to comply as circumstances may, in the adjudicator's opinion, be justified, and

(c)make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.

16.—(1) Subject to any agreement between the parties to the contrary, and to the terms of paragraph (2) below, any party to the dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.

(2) Where the adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person, unless the adjudicator gives directions to the contrary.

17. The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.

18. The adjudicator and any party to the dispute shall not disclose to any other person any information or document provided to him in connection with the adjudication which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication."

3.8 The Scheme goes on to provide that the adjudicator must deliver his decision within 28 days. The referring party may extend this to 42 days. Both parties may by agreement extend the period further. I have done a number of adjudications under the Scheme and have always managed to deliver my decision within 28 days.

3.9 <u>How has the adjudication system worked out in practice?</u> Very well. The UK adjudication regime has now been in place for 22 years. Generally speaking, it has been popular. Employers, contractors and sub-contractors welcome the speedy dispute resolution which adjudication provides.[2] In practice parties seldom bother to litigate or arbitrate after they have gone through an adjudication. In 99% of cases they either accept A's decision as permanent or reach a settlement based upon that decision.

3.10 The parties to substantial construction contracts often prefer to provide their own tailor-made adjudication regime, suited to the particular requirements of the project. That is fine, so long as it complies with the core requirements of the HGCRA.

[2] See Adrian Williamson QC, 'A second bite' in Julian Bailey (ed) *Constructions Law, Costs and Contemporary Developments*, Hart Publishing, 2018.

3.11 Adjudication enforcement. Adjudication decisions can be enforced by judicial proceedings and an application for summary judgment under CPR Part 24. The TCC has developed an expedited procedure for dealing with such applications swiftly. TCC judges adopt a robust approach. They do not investigate the wisdom of the adjudicator's decision, recognising that if the adjudicator has gone wrong, the losing party can bring fresh proceedings to vindicate its rights. See *Carillion Construction v Devonport Royal Dockyard* [2005] EWCA Civ 1358.

3.12 The Act only applies to building projects in England and Wales. But the parties to international construction contracts often choose to provide for an adjudication regime, often with a three person panel (Dispute Adjudication Board) acting as adjudicators and a somewhat longer time period for the decision. I have recently completed one such adjudication concerning an infrastructure project in Latin America. The contract allowed us three months to decide the case. Since large sums were at stake, we adopted a formal procedure, including a 2-day hearing with leading counsel on each side. Our decision in that case ran to 29 pages of fairly dense analysis of the evidence and the law. This was somewhat different from a typical adjudication decision under HGCRA and the Scheme.

4. ADOPTION OF SIMILAR ADJUDICATION REGIMES OVERSEAS

4.1 New South Wales. Adjudication and security of payment provisions were introduced to New South Wales by the Building and Construction Industry Security of Payment Act 1999.[3] As in the UK regime, the NSW Act prohibits parties from contracting out of the Act and the legislation generally binds government. Any 'pay when paid' clause is unenforceable, a default payment regime is 'imported' into the contract if one is not contractually agreed, and the contractor has a right to progress payments. An unpaid party also has the right to suspend works. The adjudication regime covers disputes about interim and final payments. It does not extend to other disputes between the parties. On 22 August 2018, New South Wales Fair Trading released the *Building and Construction Industry Security of Payment Amendment Bill 2018* (NSW) proposing a number of changes to the 1999 Act. Key changes include the introduction of a statutory entitlement to progress payments at least once per month, and the introduction of liability for directors and other individuals who have contravened the Act.[4]

4.2 Other Australian states and territories. Queensland, Victoria, and South Australia have introduced legislation which broadly follows the NSW model. See the Building and Construction Industry Security of Payment Act 2002 (amended in 2006) in Victoria and the Building and Construction Industry Payments Act 2004 in Queensland. In Western Australia and the Northern Territory, the legislation permits a wider range of disputes to be referred to adjudication: for example, extension of time claims and claims for damages.

[3] New South Wales Legislation. available at <https://www.legislation.nsw.gov.au/#/view/act/1999/46>.

[4] Ashurst LLP, 'A new bill for payments: the New South Wales Government is proposing a number of security of payment reforms', 11 September 2018, available at <https://www.ashurst.com/en/news-and-insights/legal-updates/construction-disputes-update-a-new-bill-for-payments/>.

4.3 New Zealand. In New Zealand, adjudication was introduced through the Construction Contracts Act 2002, as amended by the Construction Contracts Amendment Act 2015. When the UK 1996 Act was amended by the Local Democracy, Economic Development and Construction Act 2009, many of the changes to that UK 2009 Act were already features of the New Zealand Act.[5]

4.4 Malaysia. The Construction Industry Payment and Adjudication Act 2012 applies to all construction contracts made in writing after 22 June 2012, including those entered into by the Government of Malaysia. The adjudicator has 45 working days after issue of the response to the claim (or a reply) in order to issue a written decision.[6]

4.5 Singapore. Construction adjudication was introduced into Singapore by the Building and Construction Industry Security Payment Act 2005, which came into force on 31 January 2006. Adjudication is widely used. For a comprehensive review of the recent Singaporean case law, see S. Magintharan 'Recent developments in construction adjudication in Singapore', 36 *Construction Law Journal* (2020) 219-290.

4.6 The overall position. In all, at least fourteen overseas jurisdictions have introduced legislation based on the HGCRA or the amended HGCRA. Under many of the overseas statutes, disputes about the supply of building materials or goods are included in the adjudication regime. In the UK section 105 (2) (d) of the amended HGCRA excludes such disputes from the regime.

5. WIDER USE OF ADJUDICATION

5.1 Commentators have sometimes pointed to the success of adjudication in construction and suggested that it might be used more widely. An obvious area in which to start is professional negligence. In the UK contracts with engineers, architects and quantity surveyors are already subject to the adjudication regime. Why not extend this to contracts with solicitors, accountants and other professionals?

5.2 There is no prospect of legislation in the foreseeable future to extend the range of adjudication. But that does not prevent such extension on a voluntary basis. The Professional Negligence Bar Association of England and Wales (PNBA)[7] has taken this idea forward.

5.3 The PNBA has introduced an Adjudication Scheme. This allows disputes to be determined by an appointed adjudicator, who may be nominated by the Chairman of the PNBA or selected by the parties. This is a voluntary scheme. Neither party can insist upon adjudication, but the parties can agree to adopt the procedure if they wish.

5.4 The core provisions of the PNBA Scheme are:

"**Conduct of the Adjudication**

1. The Adjudicator will decide the dispute on the facts and according to the law and:

[5] David Finnie and Noushad Ali Naseem Ameer Ali, 'The New Zealand Construction Contracts Amendment Act 2015 - For Better or Worse?', *Construction Economics and Building* (2015) 15(4), 95-105, at 96.

[6] Nicholas Gould, Fenwick Elliott, 'Adjudication in Malaysia', available at <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_adjudication_in_malaysia.pdf>.

[7] Founded in 1991. I am currently the President of the PNBA.

1.1. may decide questions relating to his own jurisdiction (subject always, in the event the parties agree to be bound in paragraph 12 below, to the right of any party to challenge his decision as to his jurisdiction by legal proceedings or in arbitration);

1.2. may take the initiative in ascertaining the facts or law;

1.3. may call for the production of documents by either party;

1.4. will generally decide the dispute on documents alone but may, in an appropriate case, ask the parties to attend a hearing and/or to participate in a telephone conference;

1.5. where a party is claiming to be paid any sum by way of damages or other compensation shall determine whether any sum is payable and if so then how much, and may when doing so include a further sum by way of interest;

1.6. may decide which party shall pay his own fees and disbursements and, where the parties confer upon him the power to do so, may direct one party to pay some or all of the other party's costs and disbursements and for that purpose may assess the amount of any such costs and disbursements;

1.7. will act as impartial adjudicator and not as the servant or agent of the parties;

1.8. will comply with the principles of procedural fairness.

2. The Decision of the Adjudicator:

2.1. will be in writing;

2.2. will be a reasoned decision, which tells the parties why they have won or lost and what, sum, if any, is payable by one party to the other;

2.3. [will be binding upon the parties until the dispute is finally determined by legal proceedings, by arbitration (if any relevant contract between the parties provides for arbitration or the parties otherwise agree to arbitration) or by agreement]

[will be binding upon the parties subject only to paragraph 17 below, and will not be subject to appeal, whether under s.69 of the Arbitration Act 1996 or otherwise]*.

**Delete one of the two alternatives*"

[These provisions should be numbered 11 and 12, but when copied and pasted unfortunately they come out as paras 1 and 2]

5.5 The adjudicator is required to reach his decision within 56 days, subject to any extension agreed between the parties. Paragraph 17 of the PNBA Adjudication Scheme provides:
"The parties agree that any sum which the Adjudicator decides is payable by way of compensation or damages (including any interest), and that any sum payable by way of fees, disbursements or costs, shall become due and payable as a debt within 21 days of the Decision (so far as concerns any sum payable by way of compensation or damages or interest), and within 21 days of the appropriate direction for the payment of fees, disbursements or costs (so far as the payment of fees, disbursements and costs are concerned). The Decision and any direction for the payment of fees,

disbursements or costs shall be enforceable by proceedings and an application for summary judgment in the Courts. On such application, subject to any challenge on the basis of jurisdiction or procedural unfairness, it will be no defence that the Adjudicator erred in fact or law."

5.6 I understand that the AIFC International Arbitration Centre (IAC) is considering introducing an adjudication scheme, as an alternative mechanism for dispute resolution. This will probably be a voluntary scheme (similar to the PNBA Adjudication Scheme) rather than a mandatory scheme (like that imposed by HGCRA). It will be for the Registrar or Barbara Dohmann QC (as head of the IAC) to announce the details in due course.

Rupert Jackson 11 June 2020